

Little Shell Tribe of Chippewa Indians of Montana

TESTIMONY OF THE HON. JOHN SINCLAIR, PRESIDENT

SENATE COMMITTEE ON INDIAN AFFAIRS HEARING ON FIXING THE FEDERAL ACKNOWLEDGMENT PROCESS

November 4, 2009

Chairman Dorgan, Vice Chairman Barrasso, and honorable members of the Senate Committee on Indian Affairs, I want to thank you for holding this extremely important hearing. Most particularly, I want to thank, Senator Jon Tester, who has always been the Little Shell Tribe's dear friend and tireless champion.

You may remember me. During my six years as President of my tribe, I have testified before Congress on Federal Recognition issues on three separate occasions to provide evidence of the ways in which the Department of the Interior's Federal Acknowledgement Process is hopelessly broken. My name is John Sinclair, and like my grandfather and my father before me, I have been honored to serve my tribe during my Tribe's decades-long, painful history of petitioning the federal government for recognition and a reservation so that, finally, justice will be done for the Little Shell people.

Our experience with this process proves two things: first, that the process is deeply flawed; second and even worse, the process cannot be counted on to result in the recognition of legitimate Indian tribes – the stated goal of the process. As every government in Montana acknowledges, the Little Shell Band of Chippewa Indians is an Indian tribe. And yet, the Bureau of Indian Affairs (BIA) very recently refused to recognize the Tribe. Mr. Chairman, simply put, the administrative recognition process is a mess and, in all fairness and justice to Indian people, the Congress must step in and fix it. Every time a legitimate tribe fails, it undermines the sovereignty of all tribes.

The history of our Tribe is the first part of this story. Our history shows what every government of Montana knows – that the Little Shell people constitute an Indian tribe. The BIA's long and tortuous administrative deliberations on the Little Shell's petition for federal recognition is the second part of the story – that the Tribe has been subjected to an interminable and intrusive process that failed to see the reality of Little Shell tribal existence. In its insatiable desire for more and more paper, the BIA process missed the forest for the trees. Based on our painful experience with this failed process, the Little Shell people have serious recommendations to make to Congress to fix this mess.

The History of the Little Shell Tribe

The Little Shell Tribe of Chippewa Indians is a successor in interest to the Pembina Band of Chippewa Indians in North Dakota. We were buffalo hunters who lived and hunted around the Red River and the Turtle Mountains in North Dakota in the early 1800s. The Pembina Band was recognized by the United States in an 1863 treaty that was ratified by the Senate. *See* Treaty of October 2, 1863, 13 Stat. 667. After the treaty, some members of the Pembina Band settled on reservations in Minnesota but our ancestors followed the buffalo herds into western North Dakota and Montana, eventually settling in Montana and in the Turtle Mountains of North Dakota.

In 1892, the United States authorized the creation of a commission to negotiate for a cession of land from the Turtle Mountain Chippewa and provide for their removal. Chief Little Shell and his followers walked out of the negotiations and refused to accept the terms of the eventual agreement. Some of Little Shell's followers moved to Montana and joined with other members of the Pembina Band who had settled in Montana; accordingly, our collective Pembina ancestors came to be known as the "Little Shell Band." When our traditional means of livelihood died with the buffalo herds, our ancestors were left to eke out an existence in a number of shantytowns across Montana. We became known as "the trash-can Indians," or "the landless Indians." Forced to live in communities which did not welcome us, our people faced severe racism and discrimination throughout Montana, some of which continues today.

For one hundred years now, Congress has been aware of, and has attempted to address, the plight of the Little Shell people. In 1908, Congress first appropriated funds to settle our people on a land base. *See* 35 Stat. 84. In 1914 Congress again appropriated funds for this purpose, and continued to do so every year thereafter until 1925 – always to provide a reservation land base on which to settle the "homeless Indians in the State of Montana." Unfortunately, no land was ever acquired with these appropriated funds and accordingly, because we had no land base, the Department of the Interior did not recognize us as a result of these appropriation acts.

In the 1920s, newspaper articles chronicled our plight, and our leaders pleaded for help for the destitute Little Shell people. Tribal leader Joseph Dussome asked Congress, "Are we not entitled to a Reservation and allotments of land in our own County, just the same as other Indians are?" Two weeks later, the Department of the Interior rejected our leader's plea:

The Indians referred to are Chippewas of the Turtle Mountain Band. They were under the leadership of Little Shell who became dissatisfied with the treaties of the United States and the Turtle Mountain Band of Chippewas. He accordingly refused to accede thereto...The disaffected band, by its failure to accede to the terms of the treaty and remove to the reservation is now unable to obtain any rights thereon for the reason that the lands of this band are all disposed of, and the rolls became final[.]...There is now no law which will authorize the enrollment of any of those people with the Turtle Mount band for the purposes of permitting them to obtain either land or money.

Letter of Asst. Secretary Scattergood, dated December 14, 1931. Three years later, however, Congress enacted the Indian Reorganization Act (IRA), which provided a mechanism for groups of Indians like ours to organize and apply for land. In December 1935, the Commissioner of Indian Affairs took steps to organize our people under the IRA. The Commissioner proposed a form to enroll our people, stating:

It is very important that the enrollment of homeless Indians in the State of Montana be instituted immediately, and it is proposed to use this form in the determination of Indians who are entitled to the benefits of the Indian Reorganization Act.

BIA Letter, December 23, 1935. This effort resulted in the Roe Cloud Roll, named after Dr. Henry Roe Cloud, an Interior official who played a large part in the project. Once the roll was complete, the Field Administrator clearly stated that the purpose of the roll was to settle our people and bring them under active federal supervision:

The landless Indians whom we are proposing to enroll and settle on newly purchased land belong to this same stock, and their history in recent years is but a continuation of the history of wandering and starvation which formerly the Rocky Boy's band had endured.

Out of the land purchase funds authorized by the Indian Reorganization Act, we are now purchasing about 34,000 acres for the settlement of these Indians and also to provide irrigated hay land for the Indians now enrolled on Rocky Boy's Reservation. The new land, if devoted wholly to that purpose, would take care of only a fraction of the homeless Indians, but it is our intention to continue this program through the years until something like adequate subsistence is provided for those who cannot provide for themselves. The first step in the program is to recognize those Indians of the group who may rightfully make claim of being one-half degree, which is the occasion for presenting the attached applications. The fact of these people being Indian and being entitled to the benefits intended by Congress has not been questioned.

Roe Cloud Roll applications, 1937. The Department of the Interior was never able to fulfill this promise. The limited resources available to acquire land were expended for tribes already recognized. In 1940, Senator James Murray formally requested that the Department fulfill the federal government's promise to acquire land for the Little Shell Band. Assistant Commissioner Zimmerman responded that his office was "keenly aware of the pressing need of the landless Chippewa Cree Indians of Montana. The problem thus far has been dealt with only in a very small way. I sincerely hope that additional funds will be provided for future purchases in order that the larger problem remaining can be dealt with in a more adequate manner." Unfortunately, the federal government's efforts to assist the Little Shell Tribe gave way during the termination era of the 1950s, and, as a result, the land promised for our people was never forthcoming.

The Tribe's Experience with the Administrative Process

When the acknowledgment regulations were first adopted in 1978, the Little Shell Tribe was hopeful that this process finally provided the means by which the Tribe would become federally recognized and eligible for the federal Indian services that all other tribes in Montana enjoy. As the years passed, though, this hope became fear, resulting in a federal pronouncement that the Little Shell Tribe does not constitute an Indian tribe. This pronouncement is wrong, as every government in Montana knows. And this pronouncement has caused intense pain and sadness to the Little Shell people. Now, the Tribe's only real hope is the passage of S. 1936, and the Tribe is deeply appreciative to Senator Tester and Senator Baucus for giving us this hope. Without it, our people would truly be despairing now.

The administrative process is so long and so intrusive that words can hardly describe it. A few basic numbers, though, will give the committee a sense of what the Little Shell people have endured in this process. The Little Shell Tribe first petitioned for recognition in the

administrative process in 1978. On October 27, 2009 – 31 years after the Tribe initiated the administrative process – the BIA issued its Final Determination on the Tribe’s petition. During these long years that the BIA deliberated on the Tribe’s petition, the Tribe lost a whole generation of tribal elders and a whole generation of Little Shell children was born and grew to adulthood. These 31 years of deliberation on the Tribe’s petition produced more than 70,000 pages of material that constitute the administrative record in the case. Placed one on top of the other, these 70,000 pages would be 35 linear feet in height. Put another way, the BIA record includes nearly 20 pages of documentation and analysis for each member of the Little Shell Tribe. The Tribe was represented through this process by the Native American Rights Fund (NARF), which hired the multiple experts needed to navigate the process and devoted hundreds of hours of attorney time. NARF estimates that it has expended more than \$1 million in hard costs on the Tribe’s petition and an additional \$1 million in attorney time. Even if the process were otherwise perfect and resulted in the recognition of every legitimate tribe that went through it, these numbers alone show that the process is completely run amok, requiring detailed analyses and documentation beyond anything approaching reason.

Unfortunately, though, even if a legitimate tribe has the stamina, patience, and resources to make its way through this process, it cannot be certain that it will be rewarded with federal recognition at its end. There are 7 mandatory criteria used by the BIA to determine whether a tribe exists as such, 4 of which are substantive and 3 of which are mechanical (e.g., whether the tribe has been terminated.) *See* 25 CFR § 83.7. Some of the substantive criteria are really irrelevant to whether a tribe exists, others are duplicative, and the key criteria are so subjective as to defy even handed and fair application. The Little Shell Final Determination reflects all these flaws.

First, it is important to point out that there is no question that the Little Shell people are descendants of the Pembina Chippewa. The BIA itself found in the Final Determination that nearly 90% of the Little Shell membership has proven their descent from the Pembina Chippewa. And remember, these same Pembina Chippewa negotiated treaties with the United States. It would seem reasonable that where, as in the case of Little Shell, the Tribe has proven its descent from a treaty recognized entity, there should be some flexibility in the application of the other criteria. Sadly, this is not the case. The BIA found that the Little Shell Tribe had failed to prove 3 other criteria.

On criterion a, or identification of an Indian entity, the BIA found that the Little Shell had failed to give evidence of such between 1900 and 1935. In the Tribe’s view, this criterion is irrelevant to whether the Tribe exists as such. It basically says that, even if you are a tribe and can meet all the other criteria, *you will not be recognized unless outsiders have written down someplace that you are an Indian tribe.* What sense does this make? If a tribe is a tribe, it shouldn’t matter whether outsiders have recorded it as such. So failure on this criterion is meaningless on the basic question of whether the Little Shell constitutes an Indian tribe.

On criterion b, or proof of community over time, the BIA found insufficient evidence for Little Shell. The BIA also found insufficient proof on criterion c, political authority, for the same period of time. These 2 criteria overlap significantly, as the regulations themselves indicate. *See* 25 CFR §§ 83.7(b) (v), 83.7(c) (3). The overlap is also evident from the fact that every single petitioner which has failed on one has also failed on the other.

These 2 criteria, b (community) and c (political authority), are so subjective that any tribe’s evidence on them can be viewed as sufficient by one researcher and as insufficient by another. The criteria require proof of relationships – interaction among significant numbers of the members, bilateral political relations, etc. Basically, according to the BIA, the question

is one of whether there are social and political boundaries that separate the tribal group from others.

As applied by the BIA, these criteria cannot be quantified. They require that a judgment call be made in each case. And because the data compiled in each case is so massive, every researcher's overall assessment of the data is different. The Little Shell petition suffered from this flaw. For example, the Final Determination essentially concludes that there was no historic community of Little Shell, that the Tribe consists of individual Indians who sort of came together over time. But the researcher's assessment of the data in the Proposed Finding on the Little Shell petition was different. The Technical Report in support of the Proposed Finding documents that the Little Shell people responded to the disappearance of the buffalo by coming together consciously, sometimes by decision formally made by the group. Technical Report, Proposed Finding, p. 45.

This highly subjective analysis of massive amounts of data explains how the Proposed Finding on the Little Shell could be positive while the Final Determination was negative. It all depends on a personal judgment regarding an overwhelming amount of data. Basically, the BIA is looking for tribal boundaries, a tribal community that is separate from others. But if you look at a chain link fence with your face right against it, you see the holes, not the links, and you fail to see the boundary. If you take just a few steps back, you can see the fence and the links that separate those inside the fence from those outside the fence.

Former Assistant Secretary Kevin Gover understood this. He took a step back from the thousands of pages of data compiled on the Little Shell Proposed Finding to look at the Tribe as a whole in the context of its history. He understood that traditional, migrating tribes like Little Shell just do not generate the paper record that the BIA interprets the regulations to require. And he understood that the real question is does the group constitute an Indian tribe, not whether the group has a piece of paper on each of the mandatory criteria for every ten year period. The regulations themselves purport to require that each tribe's petition be evaluated in the light of its own historical circumstances, but the BIA gave no weight on the Little Shell petition to the federal policies that wreaked havoc on the Tribe. Rather, solely for the sake of administrative uniformity, the BIA takes the position that no departure from its analysis in every other petition is permissible. Every tribe must fit the BIA's mold or recognition is denied.

At the end of the day, this is the most fundamental flaw in the administrative process. It examines every tribe not just microscopically, but down to the subatomic level! And unless the features of that tribe are just like every other tribe that has been recognized, recognition must be denied. The Little Shell is penalized because it maintained its traditional life following the buffalo as long as possible instead of settling down into one place. Unless the regulations are applied in a flexible manner as Assistant Secretary Gover did, the regulations simply do not work for a migratory tribe like Little Shell.

Those who know the Little Shell Tribe the best all know that we are an Indian tribe. The State of Montana recognizes Little Shell as an Indian tribe. Every tribe in the State of Montana supports recognition of the Little Shell, including our close relatives at Turtle Mountain in North Dakota and at Rocky Boy's. Because of the strong support for Little Shell recognition, there was not a single, substantive comment made in opposition to the BIA's favorable Proposed Finding on the Little Shell petition. Nonetheless, the BIA could not see the Little Shell community and refused to recognize the Tribe. This is morally indefensible.

The Tribe's Recommendations on Recognition Reform

It is essential that the Congress step in to stop this miscarriage of justice. Congress did not create the BIA's process and has never blessed the mandatory criteria applied in that process. Both must be examined and changed in a comprehensive way in reform legislation. And Congress must do so now to make sure that no other Indian tribes are forced to endure what the Little Shell Tribe has endured.

Based on our nightmarish experience, the Little Shell Tribe makes the following recommendations to Congress regarding reform of the process:

1. The recognition process should be taken out of the hands of the BIA. Of course, the BIA has great experience with federally recognized tribes. But it does not have great experience with non-federally recognized tribes and has proved that it is not capable of identifying all legitimate Indian tribes.
2. The recognition criteria must be changed. The a criterion, identification as an Indian entity, should be eliminated because its absence does not disprove tribal existence. And the overlapping and highly subjective b (community) and c (political authority) criteria should be combined and redefined to eliminate the subjective and highly detailed examination.
3. The documentary burden must be reduced. It just makes no sense to compile records consisting of tens of thousands of pages in each case. Obviously, Indian ancestry is necessary. But it really is not necessary to present a complete profile of the community, literally showing the interaction of all tribal members, every ten years.
4. There must be meaningful deadlines in the process. It is just not acceptable that tribes spend 30 years in a recognition process.

There is a recognition reform bill that is now pending in the House of Representatives. It was introduced by Mr. Faleomavaega and is H.R.3690. This bill would abolish the BIA process in favor of an independent commission to process petitions for recognition. The Little Shell Tribe supports this idea and many of the other reforms contained in H.R.3690.

In the administration of Indian affairs, the Congress has no more fundamental responsibility than determining which Indian people are subject to federal Indian statutes and policy. Congress can no longer leave this fundamental responsibility to the administration of inflexible bureaucrats at the Bureau of Indian Affairs. In the name of the Little Shell people, I urge the committee to move forward immediately on this important issue. Justice must also be done for the Little Shell Tribe, the most recent victim of this flawed administrative process, by the swift enact of S. 1936, to extend the federal recognition that Little Shell deserves.